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In the Supreme Court of the United States

OCTOBER TERM, 1974

No. .....

CITIZENS TO PRESERVE OVERTON PARK, INC., ET AL.,
PETITIONERS

v.

ROBERT F. SMITH, COMMISSIONER,
TENNESSEE DEPARTMENT OF TRANSPORTATION

and

CLAUDE S. BRINEGAR, SECRETARY,
UNITED STATES DEPARTMENT OF TRANSPORTATION,
RESPONDENTS

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

The respondents, Robert F. Smith, Commissioner of the Tennessee Department of Transportation, and the state of Tennessee, pray that the Petition for a Writ of Certiorari to review the order of the United States Court of Appeals for the Sixth Circuit entered September 26, 1974, denying petitioners an award of attorneys' fees against the respondents, be denied.

ORDER BELOW

The order entered in the court below is not reported, but it is appended to the petition for a writ of certiorari.

JURISDICTION

Respondents do not question the jurisdiction as set forth in the petition.

QUESTIONS PRESENTED

The questions as presented by the petitioners are disingenuously framed and fail to define sharply the issues presented to the Sixth Circuit and now before this Court. Petitioners' claim for attorneys' fees from respondents raises the questions as set forth below:

1. Whether petitioners were arguably acting as private attorneys general in the appeal below?
2. Whether the Eleventh Amendment and state sovereignty bar an award of attorneys' fees against the sovereign state and its officials?
3. Whether the state of Tennessee has waived its sovereign immunity and the constitutional right secured to it by the Eleventh Amendment?

CONSTITUTIONAL PROVISION INVOLVED

The Eleventh Amendment to the United States Constitution provides:

> "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens of Subjects of any Foreign State."

STATEMENT OF THE CASE

Petitioners' statement of the case is substantially correct. Respondents would emphasize that the appeal for which petitioners claim attorneys' fees involved a dispute between

respondents and the Secretary of Transportation. Prior to respondents' petition to the District Court which led to the appeal for which the fees are claimed, they and the Secretary were co-defendants and, obviously, in agreement on the issues. When respondents succeeded in vacating the Secretary's decision as not in compliance with the district judge's remand order, the Secretary appealed. His appeal was handled by the Justice Department of the United States.

ARGUMENT

Although other issues—among which was the applicability of the so-called "private attorney general" doctrine —were briefed for the Sixth Circuit, the order below is predicated solely on the Eleventh Amendment and sovereign immunity. The Court of Appeals for the Sixth Circuit resolved this key issue on the basis of *Jordan* v. *Gilligan,* 500 F.2d 701 (6th Cir. 1974), a decision which followed and relied on *Edelman* v. *Jordan,* 39 L.Ed.2d 662 (1974).

Footnote 9 at page 14, Petition for a Writ of Certiorari, points out that the Court of Appeals for the Sixth Circuit ruled that the State's petition of February 1, 1973 effectively began a new lawsuit. Indeed, petitioners claim at page 14 of their Petition that: "[T]he only similarity between the case brought by the state and that previously brought by petitioners was that they both involved the same highway and the same park."

Thus, in scratching about to find arguments for waiver of immunity and inapplicability of the Eleventh Amendment, the petitioners have shown this Court, more persuasively than the most brilliant of opposition briefs could, why their Petition should be denied.

In their brief to the Sixth Circuit, the petitioners reviewed the three classes of equitable exceptions to the general rule that the losing party to litigation is not responsible

for the attorneys' fees of the adversary. They conceded that only the "private attorney general" exception could apply to their claim.

By pointing out to this Court that new litigation had been instituted and that they were aligned with the Secretary of Transportation, petitioners have denied themselves even a colorable claim to being private attorneys general. The essence of the "private attorney general" doctrine is that plaintiffs through litigation have effectuated strong congressional policy or prevented government officials from breaking their own laws. In the instant case, the effort of petitioners was not even necessary to resist the State's petition. Notice of appeal was filed by the government, and that appeal would have been prosecuted regardless of petitioners' participation. Respondents respectfully submit that the Justice Department of the United States is adequate legal representation for a federal official, and petitioners can most accurately be seen as amicus curiae in the appeal for which they claim fees.

The threshold question is whether the Eleventh Amendment and state sovereignty protect a state and its officials from awards of attorneys' fees for private litigants.

Respondents submit that this should be a settled issue in American law, particularly after this Court's opinion in *Edelman* v. *Jordan, supra. Edelman* clearly presented the issue of state sovereignty under the Eleventh Amendment, and the ruling in that case, that a claim which seeks to impose a liability which must be paid from public funds in the state treasury is barred by the Eleventh Amendment, is applicable to the instant claim. To include attorneys' fees under the heading of "costs," as petitioners have, does not conceal the fact that whereas "costs" are generally nominal, attorneys' fees are most often substantial.

Petitioners contend that respondents' initiation of the litigation which led to the appeal vitiates state sovereignty and Eleventh Amendment protection. However, this Court,

in *United States* v. *Chemical Foundation, Inc.*, 272 U.S. 1 (1926), held that officials of the United States could not by the act of bringing suit for the government waive its sovereign immunity against the imposition of costs and fees. Only Congress can waive the federal government's immunity.

The doctrine of sovereign immunity prevails under Tennessee law. See Tenn. Const. Art. 1, §17 and Tenn. Code Ann. §20-1702 (1955). Both state and federal courts have held that the state's immunity cannot be waived absent affirmative legislative authority. *Hill* v. *United States*, 453 F.2d 839 (6th Cir. 1972); *Daugherty* v. *S & W Construction Co., Inc.*, 196 Tenn. 357, 268 S.W.2d 94 (1954); *Quinton* v. *Board of Claims*, 165 Tenn. 201, 54 S.W.2d 953 (1932); *Moore* v. *Tate*, 87 Tenn. 725, 11 S.W. 935 (1889).

The requirement of authoritative, unmistakable action by the legislature in order to waive the state's immunity should be honored by this Court, especially in view of the fact that Congress has not required a waiver in order to participate in the federal program which is involved in the Overton Park controversy.

Petitioners, at Footnote 10, page 15, Petition for a Writ of Certiorari, claim an explicit waiver of Eleventh Amendment protection during oral argument before this Court in December, 1970. Yet, at the previous page, they are advising this Court, and attempting to rely on it, that the Sixth Circuit has ruled that the State's petition initiated new litigation. Notwithstanding the settled legal principle that only a state's legislature can waive its sovereign immunity, the fact that new litigation was proceeding precludes petitioners' reliance on an alleged waiver in a prior case.

CONCLUSION

Respondents respectfully submit that since the appeal for which petitioners claim attorneys' fees involved a dis-

pute between the state of Tennessee and the Secretary of Transportation, and since the Secretary's appeal was handled by the Justice Department, the petitioners fail to state even an arguable claim to being private attorneys general.

Furthermore, since petitioners seek to impose a liability which would have to be paid from public funds of the State, their claim is barred by the Eleventh Amendment and state sovereignty. No waiver of this constitutional right has occured.

Respectfully submitted,

J. Alan Hanover
Donald W. Schwendimann

HANOVER, WALSH, BARNES & JALENAK

219 Adams Avenue
Memphis, Tennessee 38103

Attorneys for Respondents